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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Petitioner and Respondent, v. THOMAS LEE SPILLER, Defendant and Appellant.	F076571 (Super. Ct. No. SC072765A) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Kern County. Michael G. Bush, Judge.

Diane Nichols, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Ivan P. Marrs, and William K. Kim, Deputy Attorneys General, for Petitioner and Respondent.

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[*] Before Smith, Acting P.J., Meehan, J. and Snauffer, J.

Defendant Thomas Lee Spiller contends on appeal the trial court abused its discretion when it denied his petition for resentencing under Proposition 36 (Pen. Code, § 1170.126)[1] based on a finding that resentencing him would pose an unreasonable risk of danger to public safety. He argues the trial court was required to consider that he would remain subject to another long prison term even if he were resentenced on the current conviction. We agree. Accordingly, we reverse and remand for further proceedings.

PROCEDURAL SUMMARY[2]

In March 1997, defendant was convicted of five counts of robbery (§ 211) and was sentenced to 10 years in prison.

In June 1998, defendant was convicted of smuggling methamphetamine into prison (§ 4573) and conspiring to smuggle methamphetamine into prison (§ 182, subd. (a)). In addition, he was found to have suffered five prior "strike" convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)). He was sentenced to 25 years to life.

In March 2001, defendant was convicted of attempted murder (§§ 664, 187) and assault while serving a life sentence (§ 4500), with a great bodily injury enhancement (§ 12022.7). He was sentenced to a consecutive term of 45 years to life.

On November 6, 2012, voters passed Proposition 36.

On December 23, 2013, defendant filed a Proposition 36 petition seeking to recall his 25-year-to-life sentence on the 1998 conviction for drug smuggling and conspiracy to commit drug smuggling. The trial court denied defendant's petition, reasoning he was

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[1] All statutory references are to the Penal Code.

[2] Some of the facts are taken from defendant's previous case, *People v. Spiller* (2016) 2 Cal.App.5th 1014.

ineligible for resentencing because his conviction for attempted murder was a prior disqualifying conviction.

Defendant appealed, and on August 29, 2016, we concluded his attempted murder conviction was not a prior disqualifying conviction because it did not occur before his third strike indeterminate life sentence was imposed (see § 1170.126, subd. (e)(3)). We reversed and remanded for the trial court to determine whether defendant would pose an unreasonable risk of danger to public safety such that he should not be resentenced. (*People v. Spiller*, *supra*, 2 Cal.App.5th at pp. 1026–1027.)

On October 30, 2017, a resentencing hearing was held on remand. Defendant, who was 44 years old at the time of the hearing, testified he entered prison when he was 23 years old, caught in a cycle of drugs and crime. In prison, he joined a gang for protection, but later dropped out when a prison program made that possible. He was still involved in some fights, but very few for a prison inmate. Some fights were his fault; others were necessary to defend himself or avoid becoming a perpetual victim. He tried to avoid the younger, more aggressive inmates, although it was not always possible. He listed the classes he had taken and the other ways he was working to better himself in prison. Resentencing would mean he would have only one life sentence to serve. It would provide him a light at the end of the tunnel.

Defendant testified that in addition to the 25-year-to-life term in the current case, he was also serving a 45-year-to-life term for the 2001 assault conviction. He believed his first eligible parole date was 2076. Without the 25-year-to-life term in the current case, however, he might be eligible for the Elderly Parole Program when he turned 60 in 2033 (see § 3055).[3]

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[3] We note that the Elderly Parole Program does not apply to all cases. (See, e.g., § 3055, subd. (g) ["This section shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667, or in which an individual was sentenced to life in prison without the possibility of parole or death."].)

After defendant's testimony, defense counsel argued that even if the court resentenced defendant, his earliest possible date of release would be 2033 when he turned 60 years old, at which time the Board of Parole Hearings (Board of Parole) would consider everything he had done up to that point before deciding whether to release him. Counsel argued defendant was smart, capable, and productive. He was working to better himself. Granting the petition would give him hope and motivation to continue being productive in prison.

The trial court denied the petition, noting defendant had engaged in a lot of fights and had suffered a lot of convictions. The court had seen other defendants who managed to avoid fighting in prison. The court concluded:

> "I just—there's no way I can make a finding that you're not a—that you have met the standard that you would not pose a reasonable risk to public safety. I think that you would. [¶] [Defense counsel], I don't think I can guess or speculate what would happen in his other case. *I have to assume that if I granted this, he'd be released today*. I don't know where he'll be when he's 60 years old or older. I hope he changes his way, but I just have to make that finding. I just cannot grant this motion. Petition denied." (Italics added.)

On November 14, 2017, defendant filed a notice of appeal.

DISCUSSION

I. Proposition 36

In November 2012, California voters approved Proposition 36, the Three Strikes Reform Act of 2012, which amended sections 667 and 1170.12. Prior to that, the former Three Strikes law mandated that a defendant who had been convicted of two or more serious or violent "strike" felonies would be subject to a sentence of 25 years to life upon conviction of a new felony, the third strike. Proposition 36 amended the Three Strikes law so that a defendant with two or more strikes who is convicted of a new felony is subject to a sentence of 25 years to life only if the new felony is either serious or violent

(or if certain exceptions apply); otherwise he is sentenced as a second strike offender. (See *People v. Frierson* (2017) 4 Cal.5th 225, 229–232.)

Proposition 36 also added section 1170.126, which allows eligible inmates who are currently serving a 25-year-to-life sentence under the former Three Strikes law to petition the trial court for resentencing. An inmate is eligible to petition for resentencing if his sentence would not have been a 25-year-to-life sentence had he been sentenced under the newly reformed Three Strikes law—that is, if he is serving an indeterminate life sentence based on a third felony that is *not* a serious or violent felony, as defined by subdivision (c) of section 667.5 or subdivision (c) of section 1192.7. (§ 1170.126, subds. (a), (b); *Teal v. Superior Court* (2014) 60 Cal.4th 595, 598.)

Under Proposition 36, if a petitioning inmate meets the statutory eligibility requirements, "the petitioner shall be resentenced … unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) In determining if resentencing would pose an unreasonable risk of danger, the court has broad discretion to consider: "(1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g); see *People v. Valencia* (2017) 3 Cal.5th 347, 354.) "Thus, as the Legislative Analyst explained in the Voter Information Guide, '[i]n determining whether an offender poses [an unreasonable risk of danger to public safety], the court could consider *any evidence* it determines is relevant, such as the offender's criminal history, behavior in prison, and participation in rehabilitation

programs.' (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) analysis of Prop. 36 by Legis. Analyst, p. 50, italics added.)" (*People v. Valencia*, *supra*, at p. 354.)

The prosecution must prove dangerousness by a preponderance of the evidence. (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1301, 1303, 1305.) We review the trial court's decision regarding dangerousness under the deferential abuse of discretion standard. (*Id*. at p. 1303.)

II. Proposition 36 Resentencing in Light of Other Terms

As noted above, defendant maintains the trial court should have considered the 45-year-to-life term on his other conviction and his possible release date when it determined whether resentencing on the current conviction would create a risk of danger to the public. We agree.

Historically, the Supreme Court has applied a count-by-count approach to Three Strikes sentencing issues. For example, the court concluded that when a trial court considers whether to dismiss (or strike) a prior conviction allegation pursuant to section 1385, the court may consider each count individually. (*People v. Garcia* (1999) 20 Cal.4th 490, 499–500 (*Garcia*).) "Thus, … a court might strike a prior conviction allegation in one context, but use it in another." (*Id*. at p. 496.) Even where two offenses are " 'virtually identical, a defendant's "prospects" [citation] will differ greatly from one count to another because a Three Strikes sentence on one count will itself radically alter those prospects.' [Citation.] As an example, [*Garcia*] noted that once the defendant … received a term of 30 years to life on one of his burglary convictions, 'his "prospects" for committing future burglaries diminished significantly.' [Citation.] Not only is the defendant's sentence 'a relevant consideration when deciding whether to strike a prior conviction allegation[,] … it is the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences.' "

(*People v. Johnson* (2015) 61 Cal.4th 674, 689 (*Johnson*), citing *Garcia*, *supra*, at pp. 499–500.)

Similarly, the resentencing provisions of Proposition 36 are also applied to counts individually. The existence of a serious/violent felony count that is ineligible for resentencing does not prevent the resentencing of a nonserious/nonviolent felony count that is eligible, and the existence of the ineligible count's long prison term may in fact affect the decision of whether to resentence on the eligible count. (*Johnson*, *supra*, 61 Cal.4th at pp. 687–690.) *Johnson* explained in more detail: Proposition 36's "more lenient sentencing with respect to felonies that are neither serious nor violent, despite a conviction of a serious or violent felony, reflects recognition of the fact that when a defendant has received an indeterminate life term on one count, the defendant's prospects for committing additional crimes is diminished significantly." (*Id*. at p. 690.) Furthermore, "[a] count-by-count approach to sentencing is also consistent with representations made to voters in support of the initiative. By focusing on each count, the amendments 'make the punishment fit the crime.' [Citation.] This approach also provides that '[r]epeat criminals will get life in prison for serious or violent third strike crimes,' and '[r]epeat offenders of non-violent crimes will get more than double the ordinary sentence.' [Citation.] Because a person convicted of a serious or violent felony will receive a minimum sentence of 25 years to life for that offense [citation], and will not be granted parole if the Board of Parole Hearings determines that 'consideration of the public safety requires a more lengthy period of incarceration' [citations], 'truly dangerous criminals will receive no benefits whatsoever from the reform.' [Citation.] And by reducing the sentence imposed for a count that is neither serious nor violent, the amendments allow an inmate who is also serving an indeterminate life term to be released on parole earlier if the Board of Parole Hearings concludes he or she is not a threat to the public safety, thereby 'mak[ing] room in prison for dangerous felons' and saving money

that would otherwise be spent on incarcerating inmates who are no longer dangerous." (*Id*. at pp. 690–691.)

In *People v. Williams* (2018) 19 Cal.App.5th 1057 (*Williams*), as in the present case, the defendant appealed the trial court's denial of his Proposition 36 petition, contending the trial court abused its discretion in finding that resentencing him would pose an unreasonable risk to public safety. He argued that even with a reduced sentence on the conviction in question, he would still be subject to a 168-year-to-life term in prison and could only hope to be paroled in 24 years when he would be 77 years old. He maintained it was a " 'virtual impossibility' " that resentencing would endanger public safety because the soonest he could be released was 24 years hence and only if the parole board found he could safely be released. (*Id*. at p. 1062.)

Williams stated: "[*Johnson*'s] reasoning drives the analysis in this case as well. Determining whether resentencing a defendant poses an unreasonable risk of danger to society is necessarily a forward-looking inquiry. When determining whether resentencing poses an unreasonable risk of danger, the trial court must look to when a defendant would be released if the petition is granted and the defendant is resentenced. A defendant who would obtain immediate release if the petition is granted poses a different potential danger to society than a defendant who could be released only in his or her 70's. This applies with even greater force to a defendant who would still be serving a sentence greater than a human lifespan even if the petition were granted. For example, defendant's current term of 193 years to life is the equivalent of life without parole since he cannot obtain parole until far beyond a human lifespan. Taking 25 years off this term would still leave a parole date beyond any possible life expectancy. If a defendant's term is still effectively life without parole after resentencing, then resentencing cannot pose an unreasonable risk to public safety." (*Williams, supra*, 19 Cal.App.5th at p. 1063.)

The court summarized: "If defendant's claim is correct, then granting the petition would not entitle defendant to be released. Rather, the dangerousness determination would be deferred until defendant was 77 and would be vested in the Board of Parole Hearings. (§ 3041, subd. (b)(1); Cal. Code Regs., tit. 15, § 2402, subd. (a).) Resentencing poses significantly less danger to society if it is contingent on a finding at some future date that the defendant no longer poses a threat to society. (See § 3041, subd. (b)(1) ['The panel or the board, sitting en banc, shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual.'].) The trial court's failure to consider when, if ever, defendant would be released if the petition was granted was an abuse of discretion. We shall therefore reverse and remand for additional proceedings." (*Williams*, *supra*, 19 Cal.App.5th at pp. 1063–1064.)

We first note that we disagree with *Williams* to the extent it describes the dangerousness determination as *deferred* until an inmate comes before the Board of Parole, because we believe a dangerousness determination is required of the trial court before an inmate can be resentenced under Proposition 36. Thus, we would merely clarify that the Board of Parole would be required in the future to conduct *yet another* dangerousness determination before deciding to release the inmate on parole. As *Williams* explains, the existence of a remaining prison term and the requirement of a future Board of Parole determination of dangerousness may help support a current finding that resentencing the inmate does not unreasonably endanger the public.

Thus, in this case, we agree with defendant that, as in *Williams*, the trial court should have considered these factors when deciding whether resentencing him would pose an unreasonable risk to public safety. Instead, the court in this case expressly stated

it had to assume defendant would be released from prison immediately. This was error. The trial court's failure to consider when, if ever, defendant would be released if the court resentenced him was an abuse of discretion. In making its determination on remand, "the trial court must take into account when defendant could be released if the petition is granted and whether that release [would be] contingent on considerations of public safety." (*Williams*, *supra*, 19 Cal.App.5th at p. 1064.)

DISPOSITION

The order denying the petition for resentencing under section 1170.126 is reversed and the case is remanded for the trial court to reconsider defendant's petition.